IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(MWANZA SUB-REGISTRY)

AT MWANZA

PC. CRIMINAL APPEAL NO. 31 OF 2021

(Arising from Cr. Appeal Case No. 17/2021 of Magu District Court. Original Primary Court of Magu Urban at Magu in Cr. Case No. 165/2021)

VENANCE OKUKU ..... APPELLANT

VERSUS

1. **THOMAS JACKSON @ OTENA**
2. **HERZON DENIS**
3. **SAMWEL THOBIAS**
4. **TUKIKO AGAKI**
5. **AKACHA ONJACK**
6. **FREDY OTEWA @ OGIRI**

.....RESPONDENTS

JUDGMENT

25th May & 21st June, 2022

DYANSOBERA, J.:

This is a second appeal. The appellant is seeking to impugn the judgment of the District Court of Magu in Criminal Appeal No. 17 of 2021 delivered on 27th day of September, 2021 wherein his first appeal was dismissed. According to the petition appeal filed on 25th October, 2021, the appellant has raised the following complaints: -

1. That the 1st appellate court erred in law and in fact by holding that the appellant did not prove his case beyond reasonable doubt.

2. That the 1st appellate court erred in land in fact by holding that the appellant had a duty or burden to prove the charged under section 3 (2) and 114 (1) of the Evidence Act Cap.6 R.E.2019 knowingly that the Evidence Act does not apply in Primary Court and there is neither such procedure nor legal reasons for the appellant to do so.
3. That the 1st appellate court erred in law and in fact by relying only on medical evidence without taking into consideration of the evidence of the appellant and his witnesses.
4. That the 1st appellate court erred in law and in fact by shifting the duty of filling in the PF 3 to the appellant while it was the duty of the Doctor.

Before determining this appeal, I think pertinent to state, albeit briefly, the facts of the case. The appellant and respondents are Luo by tribe and reside in Magu District, Mwanza Region. The appellant and respondents have a joint Luo society known as UGALAMULO. On Sunday, the 2nd day of May, 2021 at about 1700 hrs., the appellant and his fellows were at a meeting at Mwanabudo venue. During the meeting, an issue arose on the legality of attendance of some members whose membership had been disbanded. An altercation ensued and the matter was reported to the police as a result the Officer in Command of Magu District went to

the crime scene. The appellant went to Magu District Hospital and after Gregory Pantaleon (PW 3), a Medical Doctor attended him he was, upon his own, referred to Sekou Touré Hospital and was attended to by Ipian Hadson (PW 2) who filled in the Police Form No. 3.

On 18th day of May, 2021, the six respondents were arraigned in court for the offence of assault causing actual bodily harm c/s 241 of the Penal Code [Cap 16 R.E.2019]. Upon consideration of evidence, the trial court found the case against the respondents not proved to the required standard. It acquitted them. The appellant's first appeal to the District Court was dismissed, hence this appeal.

At the time of hearing this appeal, learned Counsel, Ms. Leticia Sabas Lugakingira appeared for the appellant and argued the appeal whereas Mr. A. Molland, learned Advocate stood for the respondents.

In support of the appeal, Counsel for the appellant, adopting the four grounds of appeal as part of her submission, she combined grounds number 1 and 2 and argued them together. She submitted that the trial court erred when it found that the appellant had failed to prove his case beyond reasonable doubt as the appellant and six witnesses proved before the trial court that the respondents assaulted the appellant. Admitting that in this case the onus of proof was on the complainant, Counsel for the appellant argued that it was a misdirection on part of the

District Court when it cited the provisions of section 3 (2) of the Evidence Act [Cap. 6 R.E.2019] which is inapplicable in Primary Courts. She contended that it is the Magistrate's Courts Rules of Evidence in Primary Court which is applicable in and what the claimant must prove are all the facts which constitute the offence unless the accused admits.

Arguing on the 3rd ground of appeal, Ms. Lugakingira faulted the first appellate court's reliance on the opinion of the Doctor as, according to her, the appellant who was the complainant at the trial Primary Court proved that he was beated and his evidence was supported by his witnesses. Counsel for the appellant cited the case of **Abdul Abdul Baaadi Timam v SMZ**, Criminal Appeal No. 185 of 2005 reported in [2006] TLR 188 on the correct, credible and trustworthy evidence of an eye witness vis a vis the opinion of a medical officer pointing to alternative possibility.

With respect to the 4th ground of appeal, the first appellate court is being faulted for transferring to the appellant the responsibility to fill remarks on the PF 3 and argued that it was the duty of the Doctor and not the appellant who was a patient. She supported her argument by referring this court to page 9, first paragraph, 2nd line from the end of the trial court's proceedings. With this submission, learned Advocate

prayed for the appeal to be allowed, he lower courts judgment be set aside and the respondents to be convicted.

Resisting the appeal, Mr. A. Molland, at first, put up the following argument on the jurisdiction of this court with regard to the 2nd, 3rd and 4th grounds of appeal. He contended that this court being the second appellate court lacks jurisdiction to determine the said three grounds of appeal in that the said issues were not raised at the first appellate court as such cannot be raised now at this stage. He relied on the case of **Kadili Ally v. R.**, Criminal Appeal No. 99 of 2020 (unreported) to support his argument.

Responding to the 1st ground of appeal, Counsel for the respondents informed the court that the District Court was satisfied that the appellant had failed to prove the case to the required standard taking into account that the onus lied on him.

Admitting that the Evidence Act is not applicable in Primary Courts, he posited that the law applicable in Primary Courts that is the Magistrate's Courts (Rules of Evidence in Primary Courts) Regulations, GN No. 66 of 1972 talk the same thing talked in the Evidence Act. He referred this court to regulations 1 and 5 of the said Regulations to clarify his point.

Respecting the complaint against the trial court's failure to consider the evidence of the witnesses, Counsel for the respondent after reviewing the evidence of the appellant, PW 4, PW 5 and PW 7, asserted that they were consistent in their versions on what the respondents actually did to the appellant and that this leads to the conclusion that the evidence of these witnesses was not credible as it was inconsistent.

With regard to exhibits P 1, counsel for the respondents asserted that it did not indicate that the appellant was assaulted. It was his view that the appellant failed to discharge the burden of proving the case against the respondents.

Distinguishing the case of **Abdul Abdul** (supra), Mr. Molland maintained that there were no credible witnesses upon whom the court could believe in contradistinction to the cited case in which there were credible witnesses and their testimonies resembled. He further elaborated that the credibility of witnesses is a question of fact to which the two lower courts had concurrent findings and this court is barred to have an interference. Reliance was placed on the case of **Kadili Ally v. R**. (supra).

Counsel for the respondents rested his conclusion by praying for dismissal of the appeal with costs to the respondents in that the cases have been frivolous and the respondents have been incurring costs.

In a short rejoinder, Ms. Lugakingira sustained her argument that all the grounds of appeal and the submission are based on the evidence at the Primary Court and their proof that the appellant was assaulted. She urged the court to find that the errors in filing the PF 3 should not be taken to have dented the credibility of the witnesses. It was her view that since the Advocate for the respondents has conceded that there was a misdirection on part of the first appellate court in using the Evidence Act, then this court should nullify the proceedings.

I have gone through the trial court's record and the grounds of appeal filed by the appellant. I have equally taken into account the rival submission of the learned Counsel for the appellant and learned Senior State Attorney for respondents.

Both Counsel are at one that the Evidence Act [Cap. 6 R.E.2019] is not applicable in criminal matters before Primary Courts. Indeed, section 2 of the Act is clear on this and provides in part that:-

> *'2. Except as otherwise provided in any other law this Act shall apply to judicial proceedings in all courts, other than primary courts...'.*

However, as rightly submitted by Mr. Molland, both provisions of the respective legislations talk about the proof beyond reasonable doubt

on the existence of the alleged fact. For instance, sub-rule of rule 1 of the Schedule of the Magistrate's Courts (Rules of Evidence in Primary Courts) Regulations, 1964 GN. No. 22 of 1964 as amended by GN No. 66 of 1972 which is applicable to Primary Courts stipulates that:

1. *'Where a person is accused of an offence, the complainant must prove all the facts which constitute the offence, unless the accused admits the offence and pleads guilty.*

Likewise, what are the facts to be proved are stated under sub-rule (3) of the said Regulations thus:

The facts which must be proved are called "the facts-in-issue", and the responsibility for proving facts is called "the burden of proof"

On the weight of evidence in a criminal case, it is the law that the court must be satisfied beyond reasonable doubt that the accused committed the offence. (Regulation. 5 (1)).

With the clear legal position, the issue calling for immediate determination is whether the appellant (and his five witnesses) satisfied the trial court beyond reasonable doubt that the respondents committed the offence by proving the facts- in-issue. As alluded hereinabove, the respondents were charged with assault causing grievous harm c/s 241 which provides as hereunder: -

'241. Any person who commits an assault occasioning actual bodily harm is guilty of an offence and liable to imprisonment for five years'.

What were the facts-in-issue the appellant had to prove? The appellant had to prove beyond the following. One, that the respondents applied force. Two, that they did so intentionally that is deliberately or recklessly. Three, without consent or lawful excuse and four the respondent's action caused actual bodily harm.

What was the evidence offered at the trial court? According to the trial court's record, after a heated argument arose in respect on the members whose membership had been disbanded the appellant inquired as to why taking the members out while they were summoned. Esbon Okite rose from where he was seated and grabbed Kelvin Miku (PW 4) and, together with his fellows, took PW 4 outside. Then Samwel Thobias (3rd respondent) got hold of the appellant's belt and jack-lifted him and took him outside. Esbon Okite held the appellant by the left hand while Thomas Jackson (1st respondent) held the appellant's right hand. Oneil (Fred Ngolo), Tukiko Agaku and Akacha Onjack were assaulting him. The appellant then went to the police.

In cross examination, the appellant insisted that the 1st respondent held his right hand while he, the appellant, was being assaulted.

During the examination in chief, the appellant's evidence is clear that he was assaulted but was silent how he was being assaulted. He maintained that, *'wakawa wananipiga'*. Even when he was cross examined by the 3rd respondent, the appellant repeated the version, *'Nilishambuliwa'*.

It is on record that three witnesses testified to have witnessed the appellant being assaulted. For instance, PW 4 Kelvin Miku at p. 13 of the typed copy of the proceedings of the trial court is recorded to have stated, *washtakiwa wote wakamtoa nje wakiwa wanampiga*. Likewise, Joseph Omamo Owino who testified the 5th prosecution witness at p. 16 testified that

> *'Baada ya kumtoa Kelvin nje, Venance Okuku alikuwa jirani yangu. Akaja Samwel Thobias anamkamata Venance, Hesbon akamkamata mkono wa kulia na Thomas mkono wa kushoto wakawa wanampiga wakamtoa nje...'*

PW 6 told the trial court that Samwel Thobias jack-lifted the appellant while Esbon, Thomas, Fred Akacha started assaulting the appellant and took him outside. The last witness Sylvery Onyango Ng'ono (PW 7) supported the fact that the appellant was assaulted and taken out.

From the evidence all seven witnesses, the appellant inclusive, none stated where the appellant was assaulted and with what weapon or instrument. It is not until he was questioned by the 1st assessor that the appellant explained where he was assaulted when he said, '*nilipigwa kichwani na kwenye macho'.* This evidence does not tally with what the respondents were alleged to have done to the appellant. According to the charge sheet, '*[washtakiwa] kwa makusudi mlimshabulia mlalamikaji VENANCE s/o OKUKU na kumsababishia maumivu katika taya na katika sikio lake la kulia'.*

It is to be observed that the *taya* and *sikio la kulia*, the parts of the body alleged to be injured according to the charge sheet, differ materially from and is not the same as '*kichwani na kwenye macho'* as testified by the appellant.

Besides, the evidence of PW 2 and PW 3 who treated the appellant were clear that the appellant had no swelling, bruises, skin tears abrasions or lacerations. For instance, (Dr. Ipian Hadson) PW 2 told the trial court that *baada ya kufanyiwa x-ray, hakukuwa na mchubuko, uvimbe, mchaniko wala kupasuka.*

Likewise, Dr. Gregory Pantaleo who testified as PW 3 is recorded to have stated at p. 10 that: -

Uchunguzi wa nje ulionyesha hakukuwa na uvimbe, mpasuko wala damu iliyokuwa imevuja. Hakukuwa na michubuko wala jino lililokuwa limevunjika. X-ray haikuonyesha chochote'.

According to the law, to sustain conviction, the appellant had to prove beyond reasonable doubt that he was not only assaulted but also the assault caused actual bodily harm to him. Actual bodily harm is an injury which is more than merely transient or trifling but does not require permanency. Examples of actual bodily harm are bruises, scratches, cuts, grazes and swelling, to mention but a few. As the evidence clearly shows, the appellant failed to prove any of the body injury inflicted to him by the respondents.

In its judgment dated 4th day of August, 2021, the trial primary court was satisfied that the evidence fell short of proving the charge against the respondents. The trial court was enjoined to so hold by the clear and unambiguous provision of sub-rule (2) of rule 5 of the Magistrate's Courts (Rules of Evidence in Primary Courts) Regulations (supra) that if at the end of the case, the court is not satisfied that the facts-in- issue have not been proved the court must acquit the accused. The District Court, on first appeal, observed at p. 6 of the typed judgment that:-

The prosecution has created doubts as to whether the alleged offence was committed and whether it was the accused who committed it.

This means that there was concurrent finding of facts by the both lower courts. In his ably submission, learned Counsel for the respondents argued that this being a second appeal, this court cannot interfere with the concurrent findings of fact by the two lower courts. I agree. In the case of **Kadili Ally v. R**, Criminal Appeal No. 99 of 2020 cited to me by Mr. Molland, the Court of Appeal, speaking through Her Ladyship, Kerefu, JA, observed: -

'Since this is a second appeal, we take cognizance of the settled law that the Court should not interfere with the concurrent findings of facts, unless the courts below have misapprehended the substance, nature and quality of such evidence which resulted into unfair conviction'.

In the case under consideration, there is nothing showing that the two courts below misapprehended the substance, nature and quality of such evidence which resulted into unfair acquittal. The acquittal resulted from the appreciated evidence and the proper application of the law of the land. There is nothing warranting this court to interfere with the said concurrent findings of fact. This appeal has no merit at all.

In view of the fact that the determination of the 1st ground alone suffices to put to rest the whole appeal, I find no compelling reasons of discussing the rest three grounds of appeal.

The award of costs prayed by Counsel for the respondents but which is not sanctioned by law, is declined.

The appeal is dismissed for want of merit.

Order accordingly.

W.P. Dyansobera
Judge
21.6.2022

This judgment is delivered under my hand and the seal of this Court this 21st day of June, 2022 in the presence of the appellant and the respondents. Ms. Leticia Lugakingira, learned Counsel for the appellant is also present.

Rights of appeal to the Court of Appeal explained.

THE HIGH COURT OF TANZANIA
UHURU NA UMOJA
MWANZA

W.P. Dyansobera

Judge